> First Amendment's protections into speech that can be proscribed pursuant to an injunction and compensated for through damages. [*Id.* at 1103.]

The answer in the Ninth Circuit, as evidenced by the majority opinion, regrettably is in the affirmative. By contrast, the answer elsewhere, including in the Second Circuit where the *amicus* Victoria Kraeger lives, is distinctly in the negative. This disparity cannot be allowed to stand.

The seminal Second Circuit decision is *United States v. Kelner*, 534 F. 2d 1020 (2d Cir. 1976), *cert.* den. 429 U.S. 1022 (1976). In *Kelner*—a threat case only, with no element of incitement, *id.* at 1026—the defendant, a member of the Jewish Defense League, held a televised press conference concerning the anticipated visit to New York of Yasser Arafat. Dressed in military fatigues and seated behind a desk with a .38 caliber "police special" in front of him, the defendant declared in no uncertain terms: "We are planning to assassinate Mr. Arafat . . . just the way any other murderer is treated." *Id.* at 1021. The threat against Arafat thus could not have been more unequivocal. Nevertheless, before affirming the conviction, the Second Circuit paused over the question of law raised: "whether an unequivocal threat which has not ripened by any overt act into conduct in the nature of an attempt is nevertheless punishable under the First Amendment, even though it may additionally involve elements of expression." *Id.* at 1026.

In answering the question, the Second Circuit construed the decision of this Court in *Watts v. United States* as specifying a constitutionally-limited definition of the term "threat" which will "insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished. . . ." *Id.* at 1027. The focus must be "on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out." *Ibid.*

> So long as the threat on its face and under circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied. [*Ibid.*]

Cf. *Virginia v. Black*, *supra*, 538 U.S. at 359 ("a serious expression of an intent to commit an act of unlawful violence" to a particular individual or group of individuals).

The Second Circuit was particularly at pains to specify the requisite link between the speech and other, non-speech conduct and the requirement that the speaker actually participate in the non-speech conduct. Governmental regulation of inchoate conduct such as a supposed "threat" is constitutionally legitimate only when a communication has become "so interlocked with violent conduct as to constitute for all practical purposes part of the (proscribed) action itself." *Ibid.*, quoting T. Emerson, *The System of Freedom of Expression* (1970), at 329.

> The more general the communication—the more it relates to general issues, is addressed to a number of persons, urges general action—the more readily it is classified as expression. On the other hand, communication that is specifically concerned with a particular law, aimed at a particular person, and urges particular action, moves closer to action. Communication also tends to become action as the speaker assumes a special relation to the listener, deals with him on a face-to-face basis, or participates in an agency or partnership arrangement. [*Ibid.*; *Emerson* at 404–405.]

A so-called "threat" can constitutionally be punished "only when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action. *The speaker must, in effect, be an agent in the action.*" *Ibid.* (emphasis added).

> The essential issue is whether the speaker has made himself a participant in a crime or attempted crime of action. Short of this the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it. [*Ibid.*]

Plainly the present case would have been decided entirely differently had these standards enunciated by the Second Circuit three decades ago been followed. This conclusion is underscored by another Second Circuit decision rendered only five years ago. Remarkably similar to the present case, *New York ex rel. Spitzer v. Operation Rescue National*, 273 F. 3d 184 (2d Cir. 2001), concerned anti-abortion protestors accused of issuing "threats" against abortion clinic doctors; one protestor was found by the District Court to have threatened a clinic doctor when, soon after the murder of abortion provider Dr. Bernard Slepian, she told the clinic doctor that killing babies is no different than killing doctors. Given the context, the Second Circuit said, it was understandable that the clinic doctor feared for her safety and that the anti-abortion protestor's strong rhetoric reinforced that fear. *Id.* at 196. Nevertheless, "[w]e are also troubled by the District Court's willingness to characterize a broad range of protestor statements as 'threats' without giving them the full analysis required by the First Amendment." *Ibid.* After restating the *Kelner* criteria, the Second Circuit stressed again the constitutional requirement that the supposed "threat" be carried out by the speaker himself or herself or someone on his or her behalf:

> Although proof of the threat's effect on its recipients is relevant to this inquiry, [citation omitted] a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's coconspirators). Thus, generally, a person who informs someone that he or she is in danger from a third party

> has not made a threat, even if the statement produces fear. This may be true even where a protestor tells the objects of protest that they are in danger and further indicates political support for the violent third party. [*Ibid.*]

As the Second Circuit said, "[E]xcessive reliance on the reaction of recipients would endanger First Amendment values, in large part by potentially misconstruing the ultimate source of the fear." *Ibid.*

> [The protestor's] expression went to the core of her protest message, and the statement (even in context) did not suggest that [the protestor] was engaged in a plan to harm the clinic doctor. This statement did not indicate the "unequivocal immediacy and express intention," *Kelner*, 534 F. 2d at 1027, of a true threat. It was not a direct or even veiled threat, but expression of a political opinion. [*Id.* at 196–97 (footnote omitted).]

"As such, it is entitled to First Amendment protection." *Id.* at 197.

Beyond question, then, had the present case been adjudicated in the Second Circuit rather than in the Ninth Circuit, it would have been decided in favor of the defendants, perhaps even on summary judgment. This radical disparity between the circuits is of itself a compelling cause for review by this Court, Sup. Ct. R. 10(a), but the disparity and its practical consequences go far deeper and far more broadly in view of how jurisdiction was laid in this case and how jurisdiction is likely to be specified in future cases. Of the various defendants in this case, six lived in states outside the Ninth Circuit, and four of those, living in New Hampshire, Kansas, Wisconsin and Maryland, moved in the District Court under Fed. R. Civ. P. 12(b)(2) to dismiss the complaint for lack of personal jurisdiction. *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1365, n.9

(D.Or. 1996) ("*PPCW I*"). The District Court nonetheless denied the motion because the defendants had purposefully interjected themselves into Oregon by publishing and nationally distributing threats directed at two Oregon plaintiffs. *Id.* at 1369.

Thus, whenever there is "purposeful interjection" into Oregon or into one of the other Ninth Circuit jurisdictions by a protestor from outside the Ninth Circuit, that person will be subjected to the Ninth Circuit true-threat standard. And the protest need not be against abortion and abortion providers; it might just as easily be a protest against, for example, logging methods in the Pacific Northwest ordered by insufficiently "earth-friendly" corporate executives. Whatever the social context, whenever a protestor employs less than gentlemanly or gentlewomanly tactics in essentially "outing" someone in a Ninth Circuit jurisdiction who is engaged in activities deemed reprehensible, that protestor, wherever in this nation he or she might live, will be subject to the threat of the Ninth Circuit's true-threat jurisprudence.

And the Ninth Circuit's true-threat jurisprudence is indeed a threat to First Amendment liberty, not simply because of the prospect of, as here, a $16,000,000 damage judgment should the protestor offend it, but because the true-threat standard is such that the protestor cannot possibly know in advance what is forbidden and what is allowed. The Ninth Circuit in *PPCW VIII*, the decision which ordered a remittitur of punitive damages to only—only!—nine times compensatory damages, summarized its true-threat standard concisely and candidly: "[T]he harm actually caused to physicians is necessarily bound up with the prior poster pattern." *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F. 3d 949, 959 (9th Cir. 2005).

> [T]he threats against physicians were true threats because of the pattern of previous violence that followed

> in the wake of identifying other doctors who performed abortions on "WANTED"-type posters and the Nuremberg Files. [*Ibid.*]

To be sure, "no one involved in the present action pulled the trigger in past actions," *ibid.*, but that was not dispositive nor even particularly relevant for the Ninth Circuit. What *was* relevant and dispositive, rather, was this:

> ACLA made true threats intending to intimidate physicians by generating a fear of violence, though not necessarily intending to hurt or kill these particular providers. That said, ACLA could reasonably foresee that identifying physicians on "WANTED"-type posters and the Nuremberg Files scorecard would be interpreted as a serious expression of intent to harm.
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> ACLA did what it did knowing that physicians would believe that what had happened to others who had been identified on posters would happen to them, that is, that they would be killed, and that this would frighten them into quitting their practice rather than risk suffering the same fate as Dr. Gunn, Dr. Patterson, and Dr. Britton who had been struck down in the wake of being identified on "WANTED"-type posters. [*Id.* at 958, 959.]

Anti-abortion and other protestors therefore will now be subject to liability merely for "generating a fear of violence, though not necessarily intending to hurt or kill. . . ." They will be liable merely if they "reasonably foresee" that their speech might be "interpreted" as a serious expression of intent to harm. And it will not do to say that these *amici* and other activists like them might escape liability because they will perhaps not employ activism techniques quite like those employed by the defendants-petitioners, for the Ninth Circuit true-threat standard is so vague as to give no clear understanding of *what*, exactly, a protestor may and may not do. The activists will thus need to engage in mind-reading.

They will need to calibrate their speech according to what the subjects *believe*, or *may* believe, will happen to them on the basis of what other persons not associated with the protestors themselves have done in the past or might do in the future. Or, more likely, they will simply do nothing and thereby forego their First Amendment rights, for as *amicus* Victoria Kraeger says:

> When I heard about the Ninth Circuit ruling against ACLA, I burned my lists because I was fearful that I could be implicated also. I am shocked that the right to know and our right to free speech is so totally brought to a halt.

It is a burden on speech that is intolerable.

There is a "transcendent value to all society of constitutionally protected expression," *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975), and consequently those who wish to speak out, such as these *amici*, should not have to risk litigation to have the courts—this Court especially—more clearly mark the boundary between legitimate and illegitimate speech. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). The chilling effect upon the exercise of First Amendment rights may derive from the mere fact of even potential prosecution, unaffected by the prospects of its success or failure. *Id.* at 487. Accordingly:

> [t]he area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. [*Id.* at 490–91.]

The authoritative construction needed to illuminate what the Ninth Circuit has made into a wholly vague prohibition can come only from this Court. The Freedom of Access to Clinic Entrances ("FACE") Act, 18 *U.S.C.A.* § 248, may place a prohibition on anyone who "by threat of force" intentionally intimidates someone providing, as euphemistically phrased, "reproductive health services," 18 *U.S.C.A.*

§ 248(a), but now, under the Ninth Circuit true-threat formulation, one simply cannot say what a "threat of force" will be deemed to mean. If a pro-life protestor, after the fact, is deemed to have "generat[ed] a fear of violence," *PPCW VIII*, *supra*, 422 F. 3d at 958, or to have caused an abortion provider to "believe" that what happened to others would happen to him, *id.* at 959, the protestor might well be subjected to the same enormous liability sustained by the defendants-petitioners. "[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–403 (1966). Accordingly, "the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute." *Dombrowski v. Pfister*, *supra*, 380 U.S. at 492.

Freedom from prosecution and from the threat of prosecution is precisely what these *amici* and countless others need from this Court to preserve their right to speak out against abortion providers and against any number of other persons who are engaged in controversial activities. A statute by its terms or as judicially construed must "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits. . . ." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The FACE Act as construed by the Ninth Circuit does not do this. The ordinary people represented by these *amici* do not know and cannot know what conduct the statute prohibits. It therefore is critically essential that this Court grant the petition for *certiorari* and reverse.

CONCLUSION

It is therefore respectfully submitted that for these reasons this Court should grant the petition for *certiorari* and then reverse the final judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 27, 2006